

PETITIONER

The Honorable Robert M. Brutinel
Chairperson, Committee on Juvenile Courts
1501 West Washington
Phoenix, Arizona 85007
928-771-3305

IN THE SUPREME COURT STATE OF ARIZONA

In the Matter of PETITION)	
TO AMEND RULE 91,)	
ARIZ. R. P. JUV. CT., 17B, A.R.S.)	Supreme Court No. R-
TO PERMIT SUMMARY DISPOSITION)	
OF APPEALS FOR ABANDONED OR)	
MERITLESS APPEALS)	
_____)	

The Court Improvement Program, a program created by the Administrative Office of the Courts (AOC) as part of its Dependent Children's Services Division, respectfully petitions this court to amend Rule 91 of the Arizona Rules of Procedure for the Juvenile Court, 17B A.R.S., in order to improve the expeditious processing of appeals in adoption, dependency, guardianship and termination of parental rights (severance) matters. The amendment would permit counsel representing an appellant in such cases to file an affidavit in lieu of an appeal brief, avowing (1) the appellant has abandoned the appeal; and/or (2) after having reviewed the entire record on appeal, counsel sees no non-frivolous issue to raise on appeal. The amended rule would further permit the court of appeals summarily to dismiss the appeal upon the filing of such an affidavit.

BACKGROUND: REASONS FOR THE PROPOSED CHANGE

The Court Improvement Program was charged by AOC with the task of determining areas of the judicial process in dependency and severance matters that needed improvement.

The program created the Court Improvement Workgroup, which determined that an area of the law in need of improvement is the appellate process for juvenile dependency, severance, and similar cases. The workgroup created the Juvenile Appeals Subcommittee, directing it to explore the matter further and propose a solution. The subcommittee examined the average number of days between the filing of a notice of appeal and the disposition in the two divisions of the court of appeals and determined that it exceeded the American Bar Association's recommended period of 120 days. The subcommittee determined that the delay in the appellate process deleteriously impacts the lives of children who are the subjects of these proceedings by delaying their need for finality and stability. Specifically, adoptions of these children oftentimes are held in abeyance during the pendency of the appeal.

The subcommittee examined some of the reasons for the delay. Among them was the filing of frivolous appeals or the fact that appointed counsel was obligated to proceed with an appeal that the appellant effectively had abandoned by failing to maintain contact with counsel. In *Denise H. v. Arizona Department of Economic Security*, 193 Ariz. 257, & 5-7, 972 P.2d 241, 241 (App.1998), the court of appeals held that the statutory and constitutional right to counsel in severance proceedings does not concomitantly confer upon appellants in such proceedings a criminal defendant's Sixth Amendment right to have counsel file an appeal brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed.2d 493 (1967), raising either arguable issues or no issues at all, *see State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), or the right to have the appellate court independently review the entire record for fundamental error. Therefore, once appointed, appellate counsel have perceived that there is a legal or ethical obligation to file a brief regardless of whether there are any

meritorious issues. These unnecessary appeals must be processed along with others, thereby contributing to an overall delay in the processing of dependency and severance appeals. Additionally, the rule as it is perceived and widely interpreted poses an ethical dilemma for counsel, by requiring counsel knowingly to file briefs that may be frivolous.

This petition was provided to the Committee on Juvenile Courts on September 30, 2005 however, due to a tight schedule, discussion was incomplete and no vote to approve the petition was taken. During the December 2, 2005 COJC meeting, members were asked whether additional discussion was necessary. There was no discussion at that time and COJC members voted unanimously to approve the petition.

PROPOSED CHANGES

The proposed amendment of Rule 91, Ariz. R. P. Juv. Ct., would allow counsel to file an affidavit in lieu of an opening brief, avowing to the court of appeals that counsel has reviewed the entire record and has found no non-frivolous issues to raise. The amendment would also permit counsel to avow that the appellant had failed to maintain contact with counsel or has otherwise demonstrated an intent to abandon the appeal. Petitioner proposes that, as set forth in attachment A, which contains the proposed rule in its entirety, subsection (G) be added to Rule 91. The new subsection would provide as follows:

G. Notwithstanding any other provision of this rule or any other rule applicable to appeals in juvenile cases, in an appeal in an adoption, dependency, guardianship or severance matter, court-appointed counsel may file an affidavit in the court of appeals, on or before the date the opening brief is due, avowing either or both of the following:

i. Counsel has reviewed the entire record on appeal and finds no non-frivolous issue to raise.

ii. The appellant has failed to maintain contact with counsel, and despite diligent efforts, counsel has been unable to locate the appellant. Counsel shall specify the last date on which the appellant contacted counsel and the efforts counsel has made to locate the appellant. Counsel shall avow that for this or any other reasons, which counsel shall specify, counsel believes the appellant has abandoned the appeal.

Upon the filing of an affidavit pursuant to this subsection, the court of appeals may dismiss the appeal.

THE MERITS OF THE PROPOSED AMENDMENT

As stated above, the Court Improvement Workgroup and the Juvenile Appeals Subcommittee determined there has been significant delay in the processing of appeals in adoption, dependency, guardianship and severance matters, during which time the children who are the subjects of such matters remain in a state of uncertainty. The subcommittee believes that by reducing the number of appeals, eliminating those that are either frivolous or abandoned, the remaining appeals may be processed more expeditiously. Additionally, the proposed amendment resolves the ethical dilemma presented when appellate attorneys perceive they are compelled to file an opening brief in those cases in which there are no meritorious issues or the appellant has abandoned the appeal.

The subcommittee believes the proposed amendment does not run afoul of an appellant's statutory or constitutional right to counsel. *See* A.R.S. ' 8-235(D) (requiring appointment of counsel to indigent party appealing final order of juvenile court); *Denise H.*, 193 Ariz 257, & 6, 972 P.2d at 243 (indigent parent has right to appointed counsel on appeal based on the Due Process Clause). The right to counsel does not include the right to have counsel proceed with a frivolous or abandoned appeal. It does include the right to effective appellate representation, which means the right to have appellate counsel evaluate properly

whether an appeal should be advanced in the exercise of his or her professional responsibilities.@ *In re Jeisean M.*, 812 A.2d 80, 85 (Conn. App. 2002), relying on *M.L.B. v. S.L.J.*, 519 U.S. 102, 116-117, 117 S. Ct. 555, ___, 136 L. Ed.2d 473 (1996)(acknowledging well-established importance of parent-child relationship and care that must be taken when severing that relationship and noting that meaningful appellate consideration of claims requires Arecord of sufficient completeness@). The proposed amendment does not abrogate the appellant-s right to counsel because it ensures that counsel may only file such an affidavit if the appellant has abandoned the appeal and/or, after reviewing the entire record on appeal, counsel believes an appeal would be frivolous.

CONCLUSION

The proposed amendment to Rule 91, Ariz. R. P. Juv. Ct. will help expedite processing of juvenile appeals in adoption, dependency, guardianship and termination of parental rights (severance) matters, by eliminating frivolous and abandoned appeals. Additionally, it resolves an ethical dilemma facing appellate counsel who feel constrained to file briefs unnecessarily. For these reasons, the Committee on Juvenile Courts respectfully requests that this court amend the rule in accordance with the language set forth herein and in attachment AA.@"

SUBMITTED THIS ___ day of ____, 2005.

By _____
The Hon. Robert Brutinel
Chairman of the Court Improvement
and Juvenile Appeals Subcommittee

Workgroup